

May 21, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GERALD W.,

No. 1:18-CV-03134-JTR

Plaintiff,

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 14, 15. Attorney D. James Tree represents Gerald W. (Plaintiff); Special Assistant United States Attorney Franco L. Bacia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on August 26, 2014, alleging disability since

1 August 1, 2014, due to seizures. Tr. 85, 211-25, 239. The applications were
2 denied initially and upon reconsideration. Tr. 113-16, 119-23. Administrative
3 Law Judge (ALJ) Glenn Meyers held a hearing on May 16, 2017, Tr. 34-82, and
4 issued an unfavorable decision on October 3, 2017, Tr. 15-27. The Appeals
5 Council denied Plaintiff's request for review on June 15, 2018. Tr. 1-6. The
6 ALJ's October 2017 decision thus became the final decision of the Commissioner,
7 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
8 filed this action for judicial review on July 26, 2018. ECF No. 1, 4.

9 **STATEMENT OF FACTS**

10 Plaintiff was born in 1985 and was 28 years old as of the alleged onset date.
11 Tr. 25. He graduated from high school. Tr. 362. His primary work history was as
12 a janitor at a school and working at a saw mill. Tr. 54-61, 77.

13 Plaintiff began having seizures in the fifth grade. Tr. 343. In 2007 he
14 underwent a left temporal lobectomy with left corticography to treat his medically
15 intractable seizures. Tr. 388. In his application materials and at the hearing,
16 Plaintiff reported that he continued to experience a few grand mal seizures each
17 year and had small seizures a few times per week. Tr. 67, 255, 361, 498. He has
18 never moved out of his mother's home or lived independently. Tr. 72, 361.

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
23 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
24 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
25 only if it is not supported by substantial evidence or if it is based on legal error.
26 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
27 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
28 1098. Put another way, substantial evidence is such relevant evidence as a

1 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
2 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
3 rational interpretation, the Court may not substitute its judgment for that of the
4 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
5 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
6 administrative findings, or if conflicting evidence supports a finding of either
7 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
8 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
9 supported by substantial evidence will be set aside if the proper legal standards
10 were not applied in weighing the evidence and making the decision. *Brawner v.*
11 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

12 **SEQUENTIAL EVALUATION PROCESS**

13 The Commissioner has established a five-step sequential evaluation process
14 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
15 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
16 four, the burden of proof rests upon the claimant to establish a *prima facie* case of
17 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
18 met once a claimant establishes that a physical or mental impairment prevents the
19 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
20 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
21 to step five, and the burden shifts to the Commissioner to show that (1) the
22 claimant can make an adjustment to other work; and (2) specific jobs which the
23 claimant can perform exist in the national economy. *Batson v. Commissioner of*
24 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
25 an adjustment to other work in the national economy, the claimant will be found
26 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

27 **ADMINISTRATIVE DECISION**

1 On October 3, 2017, the ALJ issued a decision finding Plaintiff was not
2 disabled as defined in the Social Security Act.

3 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
4 activity since August 1, 2014, the alleged onset date. Tr. 18.

5 At step two, the ALJ determined Plaintiff had the following severe
6 impairments: epilepsy/seizure disorder and neurocognitive disorder. *Id.*

7 At step three, the ALJ found Plaintiff did not have an impairment or
8 combination of impairments that met or medically equaled the severity of one of
9 the listed impairments. Tr. 18-19.

10 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
11 Plaintiff could perform work at all exertional levels with the following non-
12 exertional limitations:

13 The claimant is capable of unskilled, repetitive, routine tasks in 2 hour
14 increments. He can have superficial, incidental contact with the
15 public. He is capable of working in proximity to but not in
16 coordination with coworkers. He can have occasional contact with
17 supervisors. He cannot work at any height or in close proximity to
18 hazardous conditions.

19 Tr. 19.

20 At step four, the ALJ found Plaintiff was not able to perform his past
21 relevant work as a janitor or lumber straightener. Tr. 25.

22 At step five, the ALJ determined that, based on the testimony of the
23 vocational expert, and considering Plaintiff's age, education, work experience, and
24 RFC, Plaintiff was capable of making a successful adjustment to other work that
25 existed in significant numbers in the national economy, including the jobs of
industrial cleaner, kitchen helper, and laundry worker II. Tr. 25-26.

26 The ALJ thus concluded Plaintiff was not under a disability within the
27 meaning of the Social Security Act at any time from August 1, 2014, the alleged
28 onset date, through the date of the ALJ's decision, October 3, 2017. Tr. 26-27.

ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards.

Plaintiff contends the ALJ erred by (1) failing to allow the claim when the RFC compelled a finding of disability; (2) not properly assessing Listing 11.02B; (3) improperly rejecting the opinion evidence;¹ (4) not fully crediting Plaintiff's subjective complaints; and (5) failing to order an updated neuropsychological evaluation.

DISCUSSION²

1. Medical opinion evidence

Plaintiff argues the ALJ erred by failing to properly consider the medical opinion evidence of record. ECF No. 14 at 7-13. Plaintiff specifically asserts the ALJ erred by assigning significant weight to Dr. Sawyer's opinion, but then failing to adopt all assessed limitations; and in giving only some or little weight to Dr. Cline and Dr. Mitchell. *Id.*

In a disability proceeding, the courts distinguish among the opinions of three types of acceptable medical sources: treating physicians, physicians who examine

¹ For clarity, the Court has addressed the assessment of the medical opinion evidence and the third party evidence under separate headings.

²In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held that ALJs of the Securities and Exchange Commission are “Officers of the United States” and thus subject to the Appointments Clause. To the extent *Lucia* applies to Social Security ALJs, the parties have forfeited the issue by failing to raise it in their briefing. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not specifically addressed in an appellant’s opening brief).

1 but do not treat the claimant (examining physicians) and those who neither
2 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81
3 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion carries more weight
4 than an examining physician's opinion, and an examining physician's opinion is
5 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
6 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830.

7 In weighing the medical opinion evidence, an ALJ must make findings
8 setting forth specific, legitimate reasons for the assessment that are based on
9 substantial evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
10 Cir. 1989). The ALJ must also set forth the reasoning behind his or her decisions
11 in a way that allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d
12 487, 492 (9th Cir. 2015) (finding a clear statement of the agency's reasoning is
13 necessary because the Court can affirm the ALJ's decision to deny benefits only on
14 the grounds invoked by the ALJ).

15 **A. Dr. Sawyer**

16 Plaintiff attended a consultative psychological exam with Dr. Greg Sawyer
17 in March 2015. Tr. 342-48. Dr. Sawyer reviewed Plaintiff's function report and
18 seizure questionnaire, and conducted a clinical interview and mental status exam.
19 *Id.* He concluded that Plaintiff did not have a psychiatric impairment, but clearly
20 had a memory impairment that appeared to be neurological in nature. Tr. 347. In
21 terms of functional assessment, Dr. Sawyer concluded Plaintiff would not have
22 difficulty managing funds, performing simple and repetitive tasks, or engaging in
23 effective social interactions. Tr. 348. However, Dr. Sawyer opined Plaintiff would
24 have difficulty in the following areas: performing detailed and complex tasks;
25 accepting instructions from supervisors; understanding, carrying out, and
26 remembering one or two-step instructions; performing work activities on a
27 consistent basis without special or additional instruction; sustaining concentration
28 and persisting in work-related activity at a reasonable pace; maintaining regular

1 attendance in the workplace; completing a normal workday or workweek without
2 interruptions; and dealing with the usual stresses encountered in the workplace. *Id.*

3 The ALJ gave significant weight to Dr. Sawyer's opinion that Plaintiff was
4 able to perform simple and repetitive tasks. Tr. 23. He gave lesser weight to the
5 portions of the opinion that Plaintiff did not have difficulty with social interaction
6 and would have difficulty maintaining regular attendance. *Id.* With respect to
7 attendance, the ALJ stated: "as he commented, the claimant has experienced
8 difficulty finding a job because his car is broken. The inference is that with
9 reliable transportation the claimant can work." Tr. 23-24.

10 Plaintiff argues the ALJ erred in failing to offer any reasons for not crediting
11 the remainder of the opinion. ECF No. 14 at 8-11. Defendant asserts that the ALJ
12 was not required to offer any further explanation because Dr. Sawyer did not
13 assess any specific work-related limitations, and thus the rest of the opinion was
14 not significant or probative. ECF No. 15 at 11-12.

15 An ALJ is required to explain why "significant probative evidence has been
16 rejected." *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). Here, the
17 ALJ addressed portions of Dr. Sawyer's opinion, and gave some significant
18 weight, and others lesser weight. By not including limitations in the RFC to
19 account for all of Dr. Sawyer's opinion, the ALJ effectively rejected portions of the
20 opinion. This rejection was not explained. The Court finds the remainder of Dr.
21 Sawyer's opinion to be significant and probative of Plaintiff's ability to work, and
22 thus must be addressed by the ALJ on remand.

23 **B. Drs. Cline and Mitchell**

24 Plaintiff contends the ALJ failed to give valid reasons for rejecting the
25 opinions from Dr. Cline and Dr. Mitchell. ECF No. 14 at 11-13.

26 Dr. Rebecca Cline conducted an exam for the Department of Social and
27 Human Services in April 2016. Tr. 361-65. She diagnosed Plaintiff with an
28 unspecified neurocognitive disorder, possibly due to his seizure disorder, and an

1 unspecified depressive disorder. Tr. 362. She noted mild vague symptoms of
2 depression and moderate to marked communication problems. *Id.* In terms of
3 functional limitations, she found moderate limitations in Plaintiff's ability to:
4 understand, remember, and persist in tasks by following detailed instructions;
5 make simple work-related decisions; be aware of normal hazards and take
6 appropriate precautions; ask simple questions or request assistance; communicate
7 and perform effectively in a work setting; complete a normal work day and work
8 week without interruptions from psychologically based symptoms; and set realistic
9 goals and plan independently. Tr. 363. She rated the overall severity of Plaintiff's
10 impairments as moderate.³ *Id.*

11 Two weeks later, Dr. Melanie Mitchell reviewed Dr. Cline's report, along
12 with an exam done in 2005, and agreed with the diagnoses and functional
13 limitations assessed by Dr. Cline. Tr. 366. Dr. Mitchell indicated that the
14 diagnosis was supported by the available objective medical evidence and the
15 narrative report supported the functional limitations. *Id.* Based on her review of
16 the additional records, Dr. Mitchell concluded Plaintiff was likely to remain
17 impaired for at least 24 months, "due to chronic mental health impairments
18 (cognitive in particular), very poor prognosis for gainful employment and likely
19 need for long-term resources." *Id.*

20 The ALJ gave Dr. Cline's opinion some weight, but gave the following
21 reasons for not giving it more weight: (1) the exam contained inconsistent test
22 scores regarding malingering; (2) Dr. Cline stated Plaintiff might be impaired for
23 just 6 months; and (3) she did not address how Plaintiff had previously been able to
24 perform his past relevant work. Tr. 24. The ALJ gave Dr. Mitchell's opinion little
25 weight because Plaintiff had sustained substantial gainful employment in the past
26

27 ³ The form Dr. Cline completed defined "moderate" as "significant limits on
28 the ability to perform one or more basic work activity." Tr. 363.

1 and because Dr. Mitchell did not examine Plaintiff and relied partly on Dr. Cline's
2 opinion. *Id.* The ALJ's rejections are not based on substantial evidence.

3 Dr. Cline did not indicate that the validity testing she administered was
4 inconsistent. Tr. 362. She stated: "Claimant completed a Rey at the outset of
5 today's assessment. His score of 8 indicated a below average level of effort and did
6 not provide necessary evidence of non-malingering, so he was also given a
7 TOMM. His score of 48 on the first trial indicates an excellent level of effort and
8 provides evidence of non-malingering at this time." *Id.* Dr. Cline expressed no
9 concerns with respect to validity and arrived at the conclusions she did based on
10 the evidence she obtained. Tr. 361-65. Furthermore, Dr. Mitchell indicated Dr.
11 Cline's assessment was supported by the objective medical evidence and Dr.
12 Cline's narrative report. Tr. 366. The ALJ's interpretation is not supported by
13 substantial evidence.

14 The ALJ failed to accurately discuss Dr. Cline's comments on duration. Dr.
15 Cline's full statement was: "6 [months], but possibly much longer." Tr. 364. The
16 ALJ also failed to acknowledge at all Dr. Mitchell's opinion that the duration of
17 Plaintiff's impairment would be much longer. Tr. 24.

18 Finally, Plaintiff last worked in 2013. Tr. 39, 304. His alleged onset date is
19 August 1, 2014 due to worsening of his condition after he stopped working. Tr.
20 39-40. An ability to work more than three years prior to Dr. Cline's exam, before
21 Plaintiff was alleging disability, is not relevant to the reliability of the assessment.

22 The ALJ failed to offer legally sufficient reasons for disregarding these
23 opinions. On remand, the ALJ shall reassess the entire medical record, and
24 reformulate the RFC.

25 **2. Third party Gaylynn Waheneka**

26 Plaintiff argues the ALJ erred in his partial rejection of Plaintiff's mother's
27 testimony. ECF No. 14 at 13-15.

1 Lay witness testimony is “competent evidence” as to “how an impairment
2 affects [a claimant’s] ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454
3 F.3d 1050, 1053 (9th Cir. 2006); *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19
4 (9th Cir. 1993) (“[F]riends and family members in a position to observe a
5 claimant’s symptoms and daily activities are competent to testify as to her
6 condition.”). An ALJ must give “germane” reasons to discount evidence from
7 these “other sources.” *Dodrill*, 12 F.3d at 919.

8 The ALJ gave “some weight” to Ms. Waheneka’s testimony, but stated “the
9 persuasiveness of her opinion is reduced however, because although she opines
10 that her son has difficulty remembering how to do things, this does not explain
11 how he was able to keep 2 paid jobs for substantial periods of time.” Tr. 24.

12 As noted above, a claimant’s ability to work prior to his alleged onset date,
13 barring more analysis, is not relevant to his ability to work after he alleges his
14 disability began. On remand, the ALJ will reconsider all evidence in reassessing
15 the RFC.

16 **3. Plaintiff’s subjective complaints**

17 Plaintiff contends the ALJ erred by improperly rejecting his subjective
18 complaints. ECF No. 14 at 15-20.

19 It is the province of the ALJ to make credibility determinations. *Andrews v.*
20 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be
21 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
22 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
23 medical impairment, the ALJ may not discredit testimony as to the severity of an
24 impairment merely because it is unsupported by medical evidence. *Reddick v.*
25 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of
26 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be
27 “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
28 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are

1 insufficient: rather the ALJ must identify what testimony is not credible and what
2 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
3 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

4 The ALJ concluded Plaintiff's medically determinable impairments could
5 reasonably be expected to cause some of his alleged symptoms; however,
6 Plaintiff's statements concerning the intensity, persistence and limiting effects of
7 those symptoms were not entirely consistent with the medical and other evidence
8 of record. Tr. 22. The ALJ listed the following reasons for finding Plaintiff's
9 subjective complaints not persuasive in this case: (1) the evidence was
10 inconsistent about whether, and to what extent, Plaintiff continued to have
11 seizures; (2) Plaintiff alleged difficulty understanding people when they talk to
12 him, but was able to answer questions throughout his hearing without notable
13 difficulty; (3) Plaintiff continued to drive despite alleging a disabling seizure
14 disorder; and (4) Plaintiff testified he would be able to perform his prior jobs if
15 they were offered to him. Tr. 22-23.

16 This matter is being remanded for additional proceedings to remedy errors in
17 the ALJ's evaluation of the medical opinion evidence of record. The ALJ shall
18 also evaluate Plaintiff's statements and testimony with the benefit of the
19 reconsidered medical evidence. The ALJ shall reassess what statements, if any, are
20 not consistent with the medical evidence and other evidence in the record, and
21 what specific evidence undermines those statements.

22 **4. Step three findings**

23 Plaintiff argues the ALJ erred in the step three determination by failing to
24 evaluate the specific requirements of Listing 11.02B and making only boilerplate
25 findings that the listing was not met. ECF No. 14 at 6-7.

26 A claimant is considered disabled at step three when his impairment meets
27 the durational requirement and his impairments meet or equal a listed impairment
28 in Appendix 1. 20 C.F.R. §§ 404.1520(d), 416.920(d). "An ALJ must evaluate the

1 relevant evidence before concluding that a claimant's impairments do not meet or
2 equal a listed impairment. A boilerplate finding is insufficient to support a
3 conclusion that a claimant's impairment" does not meet or equal a listed
4 impairment. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). However, the ALJ
5 is not required to state why a claimant fails to satisfy every criteria of the listing if
6 they adequately summarize and evaluate the evidence. *See Gonzalez v. Sullivan*,
7 914 F.2d 1197, 1200-01 (9th Cir.1990); *Lewis*, 236 F.3d at 512.

8 At step three the ALJ found "the severity of the claimant's mental
9 impairment does not meet or medically equal the criteria of any of the listings in
10 11.00 and/or 12.00." Tr. 18. The ALJ went on to discuss the detailed
11 requirements of Listing 12.00 and the relevant "B criteria," but made no findings
12 as to why Listing 11.02 for epilepsy was not satisfied. Tr. 18-19.

13 To meet Listing 11.02B, an individual must have "epilepsy, documented by
14 a detailed description of a typical seizure and characterized by . . . (B) dyscognitive
15 seizures, occurring at least once a week for at least 3 consecutive months despite
16 adherence to prescribed treatment." 20 C.F.R. Part 404, Subpart P, Appendix 1,
17 11.02B. Dyscognitive seizures "are characterized by alteration of consciousness
18 without convulsions or loss of muscle control. During the seizure, blank staring,
19 change of facial expression, and automatisms (such as lip smacking, chewing or
20 swallowing, or repetitive simple actions, such as gestures or verbal utterances) may
21 occur." *Id.* at 11.00H1b. Adherence to prescribed treatment means the individual
22 takes medication or follows other treatment procedures as prescribed by a
23 physician for three consecutive months. *Id.* at 11.00C.

24 The record fails to establish any plausible argument that the listing was met
25 or equaled. *Lewis*, 236 F.3d at 514. The record contains no detailed description of
26 Plaintiff's typical seizure activity approaching the definition of dyscognitive
27 seizures in the listing. Plaintiff has described his seizures as feeling faint or dizzy,
28 or as if there is a magnet in his brain. Tr. 44-45, 498. He has not indicated that

1 these “small” seizures result in any alteration of consciousness. *Id.* Furthermore,
2 Plaintiff’s testimony regarding the frequency of these seizures does not reach
3 listing level. Tr. 45. Finally, the consultative examiner indicated medication was
4 effective. Tr. 343 (“He is now taking Dilantin and Phenytoin and his seizures
5 appear to be generally controlled.”).⁴ Due to the lack of evidence supporting a
6 finding that Listing 11.02B is met or equaled, the ALJ did not err at step three.

7 **5. Step five findings**

8 Plaintiff asserts the ALJ’s RFC determination and the vocational expert
9 testimony compel a finding of disability at step five due to the limitation on
10 supervisor contact. ECF No. 14 at 5-6. He argues the vocational expert testified
11 that training periods often require more than occasional contact with supervisors,
12 which exceeds Plaintiff’s RFC, thus rendering him unemployable. *Id.*

13 Plaintiff’s argument is without merit. The vocational expert’s testimony was
14 that an individual limited to the established RFC, including occasional supervisor
15 contact, would be capable of performing the jobs identified at step five. Tr. 77-78.
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17 ⁴ The record also indicates that Plaintiff’s medication use has not been
18 consistent. *See* Tr. 241 (Plaintiff listed no current medications on his Adult
19 Disability Report), 252 (Plaintiff listed Phenytoin and Dilantin as medications, but
20 indicated he was not currently taking them), 266 (Plaintiff indicated taking no
21 medications), 276 (Plaintiff’s mother indicated he used to take medication but it
22 caused unusual behavior), 361 (Plaintiff told Dr. Cline he was not taking
23 medication for his seizures), 498-500 (treating neurologist stated “Patient has been
24 non-compliant with medications since surgery” and began a trial of Keppra); *but see* 256 (Plaintiff stated he was not currently taking any medication, then
26 immediately below on the same form stated he took them every day and had been
27 doing so for seven years), 284 (Plaintiff stated he was currently taking Dilantin and
28 Depakote); 306 (Plaintiff stated he was currently taking Phenytoin and Dilantin).

1 Her testimony regarding training periods was in response to Plaintiff's
2 representative's question regarding an individual that would have difficulty
3 communicating and would need three times the length of a normal training period:

4 VE: I believe that might be problematic, depending on the employer
5 and their tolerance for repeating. Within the training period it is
6 common to have up to frequent contact with the applicant and have
7 repeated instructions. If after the training period is done, if they're
8 continuing to need training, then there's a more likelihood that that
employer would likely terminate that worker.

9 Tr. 80. The vocational expert's testimony does not establish that the RFC compels
10 a finding of disability.

11 **6. Updated consultative exam**

12 Plaintiff argues the ALJ erred in failing to order an updated neuro-
13 psychological evaluation. ECF No. 14 at 20-21. Plaintiff asserts that since the last
14 exam was done over a decade before the hearing and prior to Plaintiff's brain
15 surgery, further development of the record was necessary. *Id.*

16 An ALJ has a duty to ensure that the administrative record is fully and fairly
17 developed. 20 C.F.R. §§ 404.1512(b), 416.912(b); *Smolen v. Chater*, 80 F.3d
18 1273, 1288 (9th Cir. 1996). Under certain circumstances, an ALJ may order a
19 consultative exam, such as when a medical source cannot or will not provide
20 sufficient medical evidence about a claimant's condition. 20 C.F.R. §§ 404.1517,
21 416.917. However, the obligation to develop the record is not unlimited, and "is
22 triggered only when there is ambiguous evidence or when the record is inadequate
23 to allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d
24 453, 459-60 (9th Cir. 2001).

25 While Dr. Cline stated that intellectual and cognitive testing would be useful
26 to determine the *cause* of Plaintiff's communication difficulties, she did not
27 indicate that she was unable to offer an opinion on his functional abilities based on
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1 the assessment she performed. Tr. 364. Similarly, Dr. Sawyer indicated that
2 Plaintiff's condition was likely more neurological than psychological, but still
3 offered a functional assessment based on the exam. Tr. 347. The evidence here
4 was not ambiguous or inadequate to allow the ALJ to evaluate the claim.

5 Therefore, the ALJ did not err in denying Plaintiff's request for additional testing.

6 **CONCLUSION**

7 Plaintiff argues the ALJ's decision should be reversed and remanded for the
8 payment of benefits. The Court has the discretion to remand a case for additional
9 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
10 (9th Cir. 1996). The Court may award benefits if the record is fully developed and
11 further administrative proceedings would serve no useful purpose. *Id.* Remand is
12 appropriate when additional administrative proceedings could remedy defects.

13 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
14 finds that further development is necessary for a proper determination to be made.

15 The ALJ's RFC determination is not supported by substantial evidence and
16 must be reevaluated. On remand, the ALJ shall reassess the medical evidence,
17 specifically the opinions of Drs. Sawyer, Cline, and Mitchell. The ALJ shall
18 reevaluate Plaintiff's subjective complaints and the testimony of the third-party,
19 formulate a new RFC, obtain supplemental testimony from a vocational expert, if
20 necessary, and take into consideration any other evidence or testimony relevant to
21 Plaintiff's disability claim.

22 Accordingly, **IT IS ORDERED:**

23 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
24 **GRANTED, IN PART.**

25 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
26 **DENIED.**

27 3. The matter is **REMANDED** to the Commissioner for additional
28 proceedings consistent with this Order.

1 4. An application for attorney fees may be filed by separate motion.
2 The District Court Executive is directed to file this Order and provide a copy
3 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
4 the file shall be **CLOSED**.

5 **IT IS SO ORDERED.**

6 DATED May 21, 2019.



A handwritten signature in black ink, appearing to read "M".

7 JOHN T. RODGERS
8 UNITED STATES MAGISTRATE JUDGE
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